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IN THE SUPREME COURT OF THE UNITED STATES

THOMAS MADDOX, WARDEN, *Petitioner,*

v.

LEIF TAYLOR, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether 28 U.S.C. § 2254(d)(2) empowers a federal habeas corpus court to refuse to apply the § 2254(e)(1) presumption of correctness for state-court factual findings because the state court did not "mention" certain evidence in making its fact determinations rather than because "clear and convincing evidence" disproved them.

2. Whether § 2254 allows the federal habeas corpus court to re-weigh the evidence from the state-court record and reject state-court factual findings that were based upon the state judge's determination of the credibility of witnesses.

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IN THE SUPREME COURT OF THE UNITED STATES

No. 04-

THOMAS MADDOX, WARDEN, *Petitioner,*

v.

LEIF TAYLOR, *Respondent.*

PETITION FOR WRIT OF CERTIORARI

Thomas Maddox, Warden of Corcoran State Prison in Corcoran, California, petitions this Court for a writ of certiorari to review the final judgment of the United States Court of Appeals for the Ninth Circuit granting habeas corpus relief to respondent Leif Taylor, a state prisoner, in this case.

OPINION BELOW

The Ninth Circuit opinion is published as *Taylor* v. *Maddox,* 366 F.3d 992 (9th Cir. 2004), and is reproduced in the appendix to this petition. The judgment of the district court denying relief, the report of the federal magistrate recommending denial, and the opinion of the California Court of Appeal affirming Taylor's criminal conviction on direct appeal are also reproduced in the appendix.

STATEMENT OF JURISDICTION

The Ninth Circuit opinion was filed on May 10, 2004, and rehearing was denied on June 16, 2004. This petition, filed

within ninety days of the denial of rehearing, is therefore proper and timely under 28 U.S.C. § 1254 and Supreme Court Rule 13.

The Ninth Circuit issued its mandate "forthwith" upon the denial of rehearing on June 16, 2004, without affording the Warden the normal opportunity under Rule 41 of the Federal Rules of Appellate Procedure to seek a stay of the mandate pending a certiorari petition. On July 9, 2004, the Circuit denied the Warden's motion to recall and stay the mandate. The Warden filed an application with Justice O'Connor to recall the mandate and to stay the Ninth Circuit judgment. On July 13, Justice O'Connor issued an order recalling and temporarily staying the mandate; but, on July 21, Justice O'Connor vacated that stay and denied the Warden's application.

STATUTORY PROVISIONS

28 U.S.C. § 2254 provides, in part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

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(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

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(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

1. In 1994, respondent Taylor was charged in state court with robbery and murder. The charges were based on evidence that he had shot and killed a young man from whom he had stolen a bicycle.

Prior to his trial, Taylor moved to suppress evidence of his tape-recorded confession to the police on grounds that it had been involuntary and illegally-obtained in violation of *Miranda* v. *Arizona*. The sixteen-year-old testified that he was tired and afraid during the middle-of-the-night interrogation at the police station; that the detectives did not effectively inform him of his *Miranda* rights; that he had asked to see his mother and a lawyer, but that the detectives had told him that he could use the phone only after he had talked with them; that, by drawing a series of long and short lines on paper, the detectives had indicated that his prison sentence would be longer if he refused to talk; that one of the detectives had thrust a ring, bearing a numerical reference to the penal code provision for murder, toward him in a threatening manner; and that in the end he had falsely acknowledged his *Miranda* waiver and falsely confessed, in a tape recording, just so he could put an end to the interrogation and call his lawyer. Arthur Close, a lawyer and friend of Taylor, testified that Taylor had telephoned him immediately after the confession and, at that time, had offered him an account of events that generally tracked, but sometimes went beyond, the version Taylor gave in his suppression-motion testimony. (Appendix A44-A49.)

In contrast, one of the two interrogating police officers, Detective Craig Remine, testified that they had advised Taylor of his *Miranda* rights both orally and in writing; that Taylor had waived his *Miranda* rights in writing at the beginning of the interrogation; that Taylor had not asked to see a lawyer or to see his mother; that, prior to the taped waiver and confession, Taylor had not asked to use the phone; that the detective had never told Taylor he could not leave or make a phone call until

he told the police what they wanted to know; that he did not recall Taylor crying during the interview; that his partner had not pointed the ring at Taylor; that, as far as Remine recalled, the officers merely had taken notes and had not drawn lines on any paper; and that he had never told Taylor that things "would go easier" if he confessed and had never promised him anything or threatened him in any way. One or the other of the detectives was present throughout the interview, and both were present together during "the bulk of the time." (Appendix G; Excerpts of Record [E.R.], *Taylor* v. *Maddox*, CA9 Case No. 02-55560.)

After hearing the testimony, observing counsels' presentation of the written *Miranda* form to the witnesses, and listening to the *Miranda* portion of the tape-recording, the trial judge stated: "I conclude, in this case, that I clearly believe, beyond a reasonable doubt, Officer R[e]mine and not the testimony of the defendant in this case." The judge later repeated that the defense case was "made *primarily* by the testimony of a witness I do not credit in this case [emphasis added]." Accordingly, the judge ruled that the confession was voluntary and that no *Miranda* violation had occurred: "I find there was no violation of *Miranda*, the *Miranda* rights were given ahead of time, when they have been given before incriminating statements were given. I find it is voluntary under the case law." The judge therefore "decline[d] to suppress the statements that were given to the officer in this case." (E.R. 68-69; Appendix G.)

2. In 1996, the California Court of Appeal upheld the trial judge's ruling and affirmed Taylor's conviction. The appellate court noted that Detective Remine had "testified to facts which, if believed, showed the waiver was knowingly and intelligently given and the confession was voluntary." It then explained that "[d]efendant's contrary testimony is not grounds for reversal" in light of the trial judge's findings on the credibility of the evidence. (Appendix F7-F8 [State Appellate Court Opinion].) The California Supreme Court denied further discretionary review.

3. In 1997, Taylor filed a federal habeas corpus petition, re-asserting his constitutional challenges to the evidence of his confession. The district judge, adopting the report and recommendation of a federal magistrate, rejected the challenge and dismissed the petition in 2001. (Appendix B [Magistrate's Report], C, D [Order and Judgment].)

4. In a published opinion, the Ninth Circuit reversed the district court. The panel determined that, in light of the trial judge's failure to "mention" what it deemed to be the important testimony of Taylor's acquaintance Close, the state court's factual findings were "unreasonable" under 28 U.S.C. § 2254(d)(2) and therefore were not entitled to the presumption of correctness for state factual determinations prescribed by § 2254(e)(1). (Appendix A25-A26.) Then, undertaking its own de novo fact-finding, assertedly under a "clear and convincing evidence" standard of review, the panel credited Taylor's version of the events surrounding the interrogation over that of the police officer. (*Id.*, A26-A37.) In doing so, the Ninth Circuit emphasized the hearsay testimony of attorney Close and considered evidence that had not been before the state court at the time it ruled on the suppression motion. (*Id.*, A28, A41.) On the basis of its appellate findings, the Ninth Circuit held that Taylor's incriminating statements were involuntary and that they also had been obtained in violation of *Miranda*. (*Id.*, A37-A38.) Finding those errors prejudicial (*id.*, A39-A42), the panel directed the district court to issue a conditional writ requiring Taylor's release from prison unless the State within 30 days from the panel's mandate agreed to forgo the evidence of Taylor's confession in a re-trial. (*Id.*, A42-A43.)

5. The Warden filed a timely petition for rehearing and a suggestion for hearing en banc. The Warden argued that the panel had erroneously construed § 2254 in refusing to accord deference to the state court rulings, and that the panel's re-determination of the facts in Taylor's favor was improper under Supreme Court presumption-of-correctness precedents. On June 16, 2004, the Ninth Circuit denied the Warden's

rehearing petition and issued its mandate "forthwith." (Appendix E.)

6. On July 13, 2004, Justice O'Connor issued an order recalling and temporarily staying the mandate. But, on July 21, Justice O'Connor vacated that stay and denied the Warden's application. The federal district court issued the writ of habeas corpus on July 26. The Warden is informed that preliminary State-court proceedings related to Taylor's re-trial are imminent.

REASONS FOR GRANTING CERTIORARI

CERTIORARI SHOULD BE GRANTED TO SETTLE IMPORTANT QUESTIONS CONCERNING THE RELATIONSHIP BETWEEN 28 U.S.C. § 2254(D)(2) AND §2254(E)(1) AND TO CORRECT THE NINTH CIRCUIT'S FAILURE TO FOLLOW THIS COURT'S AEDPA AND HABEAS CORPUS PRECEDENTS

As amended in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d)(2) and § 2254(e)(1) both prescribe standards relating to review of state-court determinations of factual issues. This Court should grant certiorari in this case to settle important questions concerning the relationship between the operation of these two provisions. Certiorari is warranted, also, because the Ninth Circuit's decision conflicts with this Court's jurisprudence with respect to whether State court opinions must specifically discuss certain aspects of the case in order to be entitled to deferential review under the AEDPA and with respect to whether federal courts may re-weigh conflicting testimony from a state evidentiary hearing and overrule the State court's credibility determinations.

A. Question One

The first question presented in this petition is whether § 2254(d)(2) authorizes a federal habeas corpus court to refuse to

apply the § 2254(e)(1) presumption of correctness for state-court factual determinations because of the manner in which the state court explains its decision rather than because of the strength of the underlying evidence. This question is one of national importance, going to the core of the fundamental changes in the scope of federal habeas corpus review of state criminal judgments wrought by Congress in AEDPA. The Ninth Circuit's construction of AEDPA's reform of the habeas corpus statute, 28 U.S.C. § 2254, is inconsistent with this Court's explanations of how that statute works. And it conflicts with the constructions of § 2254 endorsed by at least one other circuit court of appeals.

1. Section 2254(e)(1), as amended by AEDPA, provides that "a determination of a factual issue made by a State court shall be presumed to be correct," and that "[t]he applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." Under this plain language, application of the presumption of correctness seems to be unconditional; and the sole and limited means of overcoming the presumption appears to be explicitly prescribed. Indeed, in this regard, AEDPA amended the predecessor version of the statutory presumption, former § 2254(d), by entirely deleting what had been a list of eight conditions to the presumption's operation. (Cf. [Former] § 2254(d) (1995) (presumption subject to prerequisites such as "adequate" state procedures, "full and fair hearing" in state court, federal court satisfaction that determination was "fairly supported" by the state court record," provision of counsel in state fact-finding hearing, etc.).[1/]

It would seem strange, to say the least, if factual findings "presumed to be correct" under (e)(1) in the absence of clear and convincing evidence disproving them could nevertheless be rejected under (d)(2) as "unreasonable" in light of "the evidence presented in the State court." Cf. *Wiggins* v. *Smith*, 123 S. Ct.

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1. The full text of the presumption-of-correctness provision of former § 2254(d) is reproduced in Appendix H to this petition.

2527, 2539 (2003) (fact determination that documents contained certain information unreasonable and disproved by clear and convincing evidence where state conceded that documents in fact did not contain the data). To draw that conclusion opposite would in effect read the presumption out of the AEDPA scheme. And such a conclusion would appear inconsistent with this Court's admonition that the AEDPA's provisions on habeas corpus relief should be construed to give them meaning rather than render any of them a nullity. *Williams* v. *Taylor*, 529 U.S. 362, 403-404, 407 (2000). It would further appear untenable to conclude that Congress chose the improbable "Delphic" path of stripping the prior statutory presumption-of-correctness provision of its many pre-conditions as a roundabout way of maintaining the status quo. Cf. *Lindh* v. *Murphy*, 521 U.S. 320, 332-333 (1997).

The Ninth Circuit, however, concluded that the § 2254(e)(1) presumption was inapplicable to the state court's fact-finding in this case because, in the appellate panel's view, the state court's determination of the facts had been "unreasonable" under § 2254(d)—a different provision that precludes habeas corpus entirely on claims adjudicated on their merits in state court unless, inter alia, the state adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings. See § 2254(d)(2). The Ninth Circuit thus employed AEDPA's fundamental, habeas-restricting provision of § 2254(d) as a device for nullifying the operation of what otherwise would be a strengthened, unconditional AEDPA presumption-of-correctness in § 2254(e).

These AEDPA provisions for deferential review of state-court judgments work as the very heart of Congress' habeas corpus reforms. The Ninth Circuit's problematic—indeed, erroneous—construction of those basic provisions presents a question of importance meriting this Court's consideration.

Because of the importance of deferential review under AEDPA, the State of California has also filed a certiorari petition in *Mueller* v. *Nunes*, No. 03-1452, on a closely-related question—whether a state-court "evidentiary hearing" is a pre-condition to the operation of the (e)(1) presumption of correctness for state-court fact-finding—that overlaps the question presented in the case at bar. On June 14, 2004, this Court ordered the respondent in the *Nunes* case to file a brief in opposition to the State's petition.

2. The Ninth Circuit's construction of (d)(2) and (e)(1), moreover, conflicts with what this Court has said about the operation of those provisions. In *Miller-el* v. *Cockrell*, 123 S. Ct. 1029, 1042 (2003), this Court explained that (d)(2) and (e)(1) represent "independent" requirements, the former pertaining to the availability of relief in light of the state court's ultimate "decision" on the merits of claim and the latter pertaining instead to discrete state-court determinations of factual issues. And, in both *Miller-el,* 123 S. Ct. at 1041, 1045, and *Wiggins* v. *Smith*, 123 S. Ct. at 2539, 2540, this Court repeatedly explained that, to prevail, a petitioner must demonstrate both that the state-court's fact finding was incorrect by clear and convincing evidence under (e)(1) and that the state court's judgment rested on a fact determination that was unreasonable in light of the evidence under (d)(2). Rather than recognizing these provisions as hurdles for the prisoner to overcome, the Ninth Circuit treated (d)(2) as an obstacle to the State's reliance on the protection of the (e)(1) presumption.

3. In addition, in employing (d)(2) to read pre-conditions back into the (e)(1) presumption, the Ninth Circuit's construction on AEDPA conflicts with that of the Fifth Circuit in *Valdez* v. *Cockrell*, 274 F.3d 941, 950-951 & n.17 (5th Cir. 2001), cert. denied, 537 U.S. 883 (2002). In *Valdez*, the Fifth Circuit deemed "untenable" the view that Congress' deletion of the conditions in former § 2254(d) had been ineffective, and refused to interpret (d)(2) as re-imposing the old "full and fair hearing" pre-requisite on the (e)(1) fact-finding presumption.

Accord, *Morrow* v. *Dretke*, 367 F.3d 309, 315 (5th Cir. 2004). The Seventh Circuit view accords with that of the Fifth Circuit. See *Mendiola* v. *Schomig*, 224 F.3d 589, 592 (7th Cir. 2000), cert. denied, 533 U.S. 949 (2001). Other judges and commentators, also, have perceived uncertainty surrounding the question of how (d)(2) and (e)(1) operate together. See, e.g., *Channer* v. *Brooks*, 320 F.3d 188, 194 (4th Cir. 2004); *Green* v. *White*, 232 F.3d 671, 672 n.3 (9th Cir. 2000); 17A Wright et al., Federal Practice and Procedure § 4265.2 (Supp. 2001).

4. Further, the Ninth Circuit's asserted basis for deeming the state factual determination "objectively unreasonable" in this case departs from AEDPA's language. And it conflicts with this Court's interpretation, in *Early* v. *Packer*, 537 U.S. 3, 9 (2002) (per curiam), of "reasonableness" under § 2254(d).

a. In discerning (d)(2) "unreasonableness," the Ninth Circuit did not analyze the probative force of the evidence presented in state court; instead, it relied solely on the procedural basis that the state judge, in his extemporaneous oral ruling at the suppression motion, had not "mentioned" the hearsay testimony offered by defense witness Close in support of Taylor's version of the events surrounding the interrogation. (Appendix A22-A26.) Section 2254(d)(2), however, speaks of reasonableness not as a function of state fact-finding *procedures* but of the "*evidence* presented in the State court proceedings" instead. As this Court's opinion in *Wiggins* v. *Smith* in particular illustrates: when the fact-finding protected by the (e)(1) presumption is overcome under a proper understanding of the standard of "clear and convincing evidence to the contrary" (see pp. 11-13, *post*), a resulting state-court determination might be deemed "unreasonable" under (d)(2) so that an adjudication resting on it would not be protected by the normal absolute bar against federal habeas corpus relief.

b. In *Early* v. *Packer*, 537 U.S. at 9, this Court rejected the Ninth Circuit's similar attempt to rely, as a purported justification for refusing to defer to a state court ruling under § 2254(d), on the absence of an explicit statement by the state

court that it had considered the impact of certain evidence. In reversing this Circuit's decision summarily, as it has done in other Ninth Circuit AEDPA decisions that failed to defer to the state courts, this Court explained that the state court need not issue such a "formulary statement." Accord, *Miller-el* v. *Cockrell*, 123 S. Ct. at 1045 ("We adhere to the proposition that a state court need not make detailed findings addressing all the evidence before it.").

Here, as in *Packer*, the Ninth Circuit again has deemed a State-court adjudication "unreasonable" under § 2254(d), not because the ruling rested on a state-court record evidentiary record that could not support it, but only because the state judge did not announce explicitly that he had considered certain evidence in arriving at his determinations. This Court again should intervene to require the Ninth Circuit to adhere to *Packer*.

B. Question Two

The second question presented in this petition is whether § 2254, by way of (d)(2) or the presumption of correctness of (e)(1), allows the federal habeas corpus court to re-weigh the "cold" State-court evidentiary-hearing record and reject state-court factual determinations rationally supported by the direct evidence of testifying witnesses. This question merits certiorari review too. For, as with the first question presented, it also implicates the important question of the relationship between the operation of (d)(2) and (e)(1). Also, in alternately purporting to find "clear and convincing" evidence rebutting the State's fact-finding (Appendix A34), the Ninth Circuit engaged in the kind of overly intrusive review that this Court has condemned in a number habeas corpus precedents and that is indistinguishable from impermissible de novo review of the facts.

1. In rejecting the state judge's explicit finding that the policeman's direct, in-court testimony was credible and that petitioner's was not, the Ninth Circuit decision conflicts with *Marshall* v. *Lonberger*, 459 U.S. 422 (1982). In *Lonberger*, this Court explained that the habeas-corpus statutory presumption gives federal courts "no license to redetermine credibility of witnesses whose demeanor has been observed by the State trial court, but not by them." 459 U.S. at 434; accord, *Maggio* v. *Fulford*, 462 U.S. 111, 113 (1983) (conclusion that state fact determination was not "fairly supported by the record" rejected because "in reaching this conclusion, the Court of Appeals erroneously substituted its own judgment as to the credibility of witnesses for that of the Louisiana courts—a prerogative which [former] 28 U.S.C. § 2254 does not allow it."); *Rushen* v. *Spain*, 464 U.S. 114, 121 n.6 (1983) (per curiam) ("§ 2254(d) provides that the state court's determinations about witness credibility and inferences to be drawn from the testimony were binding on the District Court and are binding on us."). Similarly, in accepting as uncontradicted an isolated assertion by the petitioner that he had asked to speak with a lawyer prior to the interrogation (Appendix A35), the Ninth Circuit decision conflicts even further with *Lonberger*. See 459 U.S. at 433-436; see also *LaValle* v. *DellaRose*, 410 U.S. 690 (1973) (per curiam).

It is true that this Court suggested in *Miller-el* v. *Cockrell* that a state court's credibility determination in some circumstances might be overcome under AEDPA. 123 S. Ct. at 1041. And the Warden can imagine that there might be extreme cases in which the pertinent witness had not appeared in person before the state judge and his testimony was improbable such that no reasonable jurist could have credited it in light of clear and convincing evidence that it was incorrect. Cf. *Wiggins* v. *Smith*, 123 S. Ct. at 2539 (state court fact-finding deemed unreasonable under (d)(2) and rebutted by "clear and convincing evidence" under (e)(1) where physical evidence of documents demonstrated impossibility of finding that documents contained

certain information). In such instances, the federal court—upon holding an otherwise proper evidentiary hearing of its own—might then find the evidence sufficient to overcome the State-court determination.

Absent extreme circumstances, however, rational factual determinations resting on the credibility of a witness whose plausible testimony conflicts with other testimony should not be re-weighed in federal court as a means of defeating the (e)(1) presumption. See *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 575 (1985) ("[W]hen a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error.") As *Lonberger* and this Court's other precedents preclude a federal court from re-weighing the testimony in the service of characterizing the State record as insufficient to support State-court fact findings, it follows that a federal court may not merely label its "intrinsic" view of the same testimony—a view based on the "cold" record and without an evidentiary hearing of its own—as "clear and convincing evidence" disproving the findings. In any event, such State fact-finding, insofar as it finds a rational basis of support in the record, should not be deemed "unreasonable in light of the evidence presented in State court" under (d)(2).[2/]

It is highly doubtful that two writ-restricting provisions of the AEDPA, § 2254(d)(2) and (e)(1), would combine by some alchemy to infuse the federal habeas corpus court with enhanced

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2. The Ninth Circuit's brief mention of expert testimony adduced at trial concerning Taylor's intelligence level (Appendix A28, A41) would not justify rejection of the State court's factual determinations. The testimony was of only marginal value rather than of a "clear and convincing" nature under (e)(1). And, as it was not before the State judge at the pre-trial suppression hearing when he made his fact determinations, it logically cannot not serve to render judge's findings "unreasonable" under (d)(2).

powers at all, let alone enhanced powers in derogation of limits this Court earlier had imposed on such authority. For, as this Court has recognized, AEDPA places "more, rather than fewer, restrictions on the power of the federal court." *Miller-el* v. *Cockrell*, 123 S. Ct. at 1039-1040; accord, *Woodford* v. *Garceau*, 538 U.S. 202, 206 (2003). But the Ninth Circuit opinion in these anomalous way treats AEDPA as expanding rather than contracting an applicant's opportunity for relief.

Here, even the Ninth Circuit acknowledged that "a rational factfinder" might "discount" or "find incredible" the hearsay testimony from witness Close upon which the panel so heavily relied. (Appendix A22.) Conversely, Detective Remine's testimony was entirely plausible rather than impossible and was contradicted merely by Taylor's self-serving statements. And Taylor's testimony itself was undermined by the tape-recording, heard by the trial court, that showed Taylor's express acknowledgment of his *Miranda* rights and waiver and of his voluntary decision to speak. (Appendix G25-26; Supplemental E.R. 67-68 [interview transcript].) The state judge—observing their demeanor under oath in a way that the Ninth Circuit could not—credited the detective's and not respondent's. In contrast, the evidence that apparently was most persuasive to the Ninth Circuit comprised the Close testimony that the state court and the district court recognized as unreliable hearsay. (Appendix A19-A20, A21-A23, A25, A27-A29, B25, F12.) Indeed, on a crucial point of obvious importance to the panel (*id.*, A32, 36-37), the Ninth Circuit opinion credited Close's claim that Taylor had said he asked for a lawyer on the way to the interrogation room even though Taylor himself never made such a claim in his own testimony. Under the proper version of the facts, as found by the State court, Taylor's *Miranda* and involuntary-confession claims were failures—as the State courts and the federal district court recognized. In re-weighing the State-court testimony and arriving at a conclusion contrary to that of the State-court judge, however, the Ninth Circuit strayed far beyond

the bounds of appropriate federal habeas corpus review of State-court fact-finding.

2. In the very recent past, this Court has stepped in and reversed—often summarily—Ninth Circuit misapplications of the AEDPA rule of deferential review of legal questions under § 2254(d)(1). E.g., *Yarborough* v. *Alvarado*, 124 S. Ct. 2140 (2004); *Middleton* v. *McNeil*, 124 S. Ct. 1830 (2004) (per curiam); *Yarborough* v. *Gentry*, 124 S. Ct. 1 (2003) (per curiam); *Lockyer* v. *Andrade*, 538 U.S. 63 (2003); *Woodford* v. *Visciotti*, 537 U.S. 19 (2002) (per curiam); *Early* v. *Packer*, 537 U.S. 3 (per curiam). Now, a new series of cases shows that the Circuit is compounding its AEDPA failures by similarly refusing to defer to California-court resolutions of factual questions under § 2254 (d)(2) and (e)(1). E.g., *Collins* v. *Rice*, 366 F.3d 992 (9th Cir. 2004) (rejecting trial judge's determination crediting as genuine prosecutor's stated reasons for challenging juror); *Sanders* v. *Lamarque*, 357 F.3d 943 (9th Cir. 2004) (rejecting state court finding that a juror was prejudiced); *Nunes* v. *Mueller*, 350 F.3d 1045, 1055 (9th Cir. 2003) (rejecting state appellate court finding made without an "evidentiary hearing"); *Hall* v. *Director of Corrections*, 343 F.3d 976 (9th Cir. 2003) (rejecting state-court finding, made after evidentiary hearing, that written notes had not been doctored to falsify their meaning); *Avila* v. *Galaza*, 297 F.3d 911 (9th Cir. 2002) (rejecting state-court findings made after evidentiary hearing). Especially in view of this background, the case at bar demonstrates the need for this Court to step in again and ensure compliance with Congress' AEDPA plan and this Court's AEDPA precedents.

CONCLUSION

For these reasons, the Warden respectfully requests that the Court grant a writ of certiorari.

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